IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1978

NO. 78-1379

TAHOE NUGGET, INC. d/b/a
JIM KELLEY'S TAHOE NUGGET,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NEVADA LODGE,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF FOR PETITIONERS

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The Board's Sole Opposition Injects An Issue Not Involved

The Board in cavalier fashion deals with this case as though it were a mine-run Universal Camera situation. [1] The Board merely addresses its opposition on the basis of whether there was substantial evidence to support its order. This approach, and it is basically the only response by the Board, while understandable is unwarranted. Having carefully read the Board's brief in opposition, we have looked in vain for the Board's answers to the serious constitutional and federal law questions raised in our petition. [2] For the Board to come to grips with the serious issues raised would only lend support to the reasons

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1/ Universal Camera Corp. v. National Labor Rel. Bd., 340 U.S. 474

2/ The Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO filed a Brief in Opposition which substantially parrots the Court of Appeals and Board rationale but does not squarely meet these issues.

why this Court should grant review. We are not requesting and have not requested this Court to review an issue of substantial evidence since that is not involved here.

The Board does not respond to the admitted conflict by the Court below with the Sixth Circuit in the application of the good faith doubt defense to the Board developed presumption of continuing majority. (Pet. 10) Nor does the Board respond to the conflict which exists between the Ninth Circuit and other Circuits. (Pet. 5-10) It is completely silent on the internal conflict which exists in the Ninth Circuit on the issue. (Pet. 10-12) It does not respond to the important federal law issue of the triple presumption which the Board indulged in as the basis for its conclusion. (Pet. 16-19) It ignores the Board's failure to

follow its precedents in Celanese Corporation of America, 95 NLRB 664, and other cases cited and discussed in the Petition. (Pet. 12-16) It makes no reference to the due process issue, which both the Board and the Court below bypassed contrary to the holdings of this Court. (Pet. 19-20)

The Board apparently prefers the conflict which exists since it permits the Board to at least win in the Ninth Circuit on issues which it has lost in other Circuits.

New Cases Not Available At Time Petition Filed

Apart from the cases now pending in the Ninth and District of Columbia Circuits involving the issues raised here (Pet. 10) several other cases have recently been decided by the Ninth Circuit and other Courts involving the presumption and objective considerations.

These were reported since the petition herein was filed. National Car Rental System v. N.L.R.B., __F.2d__, 100 LRRM 2824 (C.A. 8, 1979); N.L.R.B. v. Morse Shoes, Inc., 591 F.2d 542, 545-546 (C.A. 9, 1979); N.L.R.B. v. Randle-Eastern Ambulance Service, Inc., 584 F.2d 720 (C.A. 5, 1978); and Hirsch v. Pick-Mt. Laurel Corp., 436 F.Supp. 1342 (D.N.J., 1977). 3/

In National Car Rental System, supra, the Board's order was denied enforcement, the Court holding that a "Board created presumption does not rise to the level of substantial evidence." Yet the Board is here urging precisely that in basing its position on Universal Camera. Indeed, the

3/ Randle-Eastern was decided after Petitioners' cases were decided below and Hirsch was decided in 1977, but both were not brought to our attention until reported in recent issues of LRRM (99 LRRM 3377 and 96 LRRM 2254, respectively).

Board is basing its case upon a layer of presumptions each dependent upon each other.

In Randle-Eastern, supra, the Court denied enforcement of the Board's order to bargain, holding that the "Board's determination otherwise rested on presumptions we deem inapplicable, on the rejection of inferences we consider permissible, and on an assumption that the Union's loss of support, if any, was due in part to Company conduct . . . that we have determined to be entirely lawful."

In Hirsch v. Pick-Mt. Laurel Corp., supra, the Board's petition for an injunction pendente lite under Section 10(j) of the Act [29 U.S.C. §160(j)] to enjoin an employer from refusing to bargain with a union, was denied on the basis of the employer's good faith doubt as to the union's continuing majority status. The

Court also held in construing this Court's opinion in Bryan Manufacturing Co. [4] that evidence of circumstances surrounding a time-barred unfair labor practice is admissible to explain the actions of the charged party within the limitations period (436 F.Supp. at 1354-1357). Thus, that Court, as well as the Sixth Circuit [5], is in conflict on that issue with the Court below. (Pet. 8-10, 20)

As the Court in Hirsch, supra, also pointed out, the employer "does not have the burden of proving an actual numerical majority opposing the union." (1357) The Court also took into account, contrary to the Board there and contrary to the Board and Court below, the fact that the union negotiated and executed the collective bargaining agreement "without the choice

4/ 362 U.S. 411.

5/ N.L.R.B. v. Dayton Motels, Inc., 474 F.2d 328.

or designation by any member of the bargaining unit." (1357) "This", said the Court, "is a factor not present in the cases cited by petitioner [the Board]." (1357-1358) Like in Hirsch, that factor is present in the instant case. (Pet. 4, 6, 14)

Since the issues are constantly recurring ones in the administration of the Act and since the conflicts as pointed out leave all parties in labor-management relations in a state of confusion and their rights under the Act dependent upon the Circuit which happens to decide the case, this Court must settle the issues by lifting the cases from the Court below.

Respectfully submitted,

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May 17, 1979.
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